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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

MATTHEW ZIERT, Plaintiff and Appellant, v. YOUNG'S LOCKEFORD PAYLESS MARKET, INC., Defendant and Respondent.	C079669 (Super. Ct. No. 39201000241287CUPOSTK)

Plaintiff Matthew Ziert fell while performing his pest control job on the premises of defendant Young's Lockeford Payless Market, Inc. The jury found defendant negligently caused injury to plaintiff but awarded damages only for plaintiff's medical copayments. Plaintiff appeals from the judgment, arguing substantial evidence demanded a larger verdict, and the trial court erred in denying his motion for new trial. (Code Civ. Proc., § 657; further undesignated statutory references are to this Code unless otherwise

indicated.) Plaintiff also challenges the court's award of costs to defendant for plaintiff's failure to obtain a verdict higher than defendant's pretrial settlement offer (§ 998).

Plaintiff's record on appeal is inadequate for review, because it omits critical matter such as written or verbal jury instructions, closing arguments, and transcripts of hearings on the postjudgment motions. Additionally, his claim that damages were undisputed is undermined by defense evidence that most of those claimed damages were attributable not to the subject accident but rather to preexisting injuries from a prior unrelated accident. And plaintiff fails to show error regarding section 998 costs.

We affirm the judgment, the order denying a new trial, and the order awarding section 998 costs.

FACTS AND PROCEEDINGS

Other parties to the litigation are not parties to this appeal, having been dismissed from the lawsuit without prejudice before the verdict (defendants Louis Young and Harry Young), or having dismissed a separate appeal (intervenor Zenith Insurance).

On May 30, 2008, plaintiff was working for nonparty ZAP Pest Control and was on defendant's property to inspect for rodents. Plaintiff fell about 12 feet through a false ceiling. He managed to finish his day's work that Friday, despite feeling some back and neck pain. On Monday, he sought medical treatment for cervical sprain, thoracic strain/sprain, and lumbar strain.

Plaintiff previously sustained injury in June 2003 while moving a cabinet in his prior job. His lower back ached badly and he received medical treatment for a worker's compensation claim. At that time, he was diagnosed with preexisting spondylolisthesis, a slippage of the back's vertebrae, a developmental defect not caused by the 2003 incident. The doctor presented three options: (1) "live with the pain" and find a new job; (2) steroid injections to relieve pain; or (3) surgery which was risky. In 2003, plaintiff opted

to live with the chronic pain, which plaintiff described as about a four on a scale of one to 10. If he overdid it, the pain level would go to five.

Plaintiff, who bore the burden of proof, presented the jury with lump sum medical expenses only. The jury was told that the parties stipulated to the following amounts of medical bills, with defendant "reserv[ing] the right to contest the relationship of these bills to the fall of May 30, 2008":

VA Hospital - Low Back	$370,337
VA Hospital - Neck/Upper Back	$28,417
VA Hospital - Pain Management	$20,300
Plaintiff - Co-pay Expense	$2,882
Zenith Insurance	$17,122

The defense presented evidence that plaintiff sustained only minimal injuries in the 2008 fall, and the expenses for low-back problems were attributable to his preexisting condition. The jury also heard testimony that the VA Hospital had a lien for its medical bills, which plaintiff would have to pay if the jury awarded plaintiff a recovery for those bills. "So if there is a recovery of monies for anything that they [the VA] have paid for, they ask to be paid back, hence the lien."

Plaintiff, who bears the burden on appeal, did not include in the record on appeal the reporter's transcript of closing arguments to the jury.

Although the closing arguments are not part of the record on appeal, the lawyers' opening statements are part of the record on appeal and forecast theories that support the judgment, i.e., that plaintiff failed to show that his claimed damages were attributable to this 2008 incident on defendant's premises, as opposed to his ongoing chronic problems from his unrelated injury in 2003 or his preexisting spondylolisthesis.

Defense counsel's opening statement included the following:

"So we know that Mr. Ziert falls through the false ceiling and he injures himself. But it's been pointed out to you already, we know that Mr. Ziert had a preexisting low

back complaint and that he had actually had a prior workers' comp claim. [¶] And this is important to note, because they're going to be arguing at the time of closing that all of his low back problems are related to this fall.

"But Mr. Ziert's testimony, at the time we took his deposition, was that he had low back pain at a four out of ten on a constant basis from the time of that earlier fall in 2003 to the time of the incident at my client's store. Four out of ten.

"He's also going to testify that sometimes that pain that he had was excruciating during that time from after the incident at the prior employer and before the incident at my client's store, so excruciating that about every three months or so, he had to take more medications, relax, and it became extreme in radiating down his leg.

"So the argument is going to show that he did have prior problems to his back and that the fall was not a substantial contribution to his ongoing current complaints."

The parties waived the court reporter for reading of jury instructions, and plaintiff fails to include written jury instructions in his record on appeal (Appellant's Appendix). Defendant submits with its Respondent's Appendix a copy of CACI No. 3927, which was requested by all parties and given as modified: "[Plaintiff] is not entitled to damages for any physical or emotional condition that he had before [defendant's] conduct occurred. However, if [plaintiff] had a physical or emotional condition that was made worse by [defendant's] wrongful conduct, you must award damages that will reasonably and fairly compensate him for the effect on that condition."

During deliberations, the jury asked, "Can we put $0 [for damages] or must the #'s match what was given." The court responded, "You must decide the evidence. It can be $0."

In May 2015, the jury returned a special verdict finding that defendant was negligent; its negligence was a substantial factor in causing harm to plaintiff; and plaintiff's total damages caused by this accident (without taking into consideration plaintiff's proportionate fault) were $2,882 for plaintiff's copayments and zero for

everything else: Zero for past wage loss damages, zero for future wage loss/earning capacity, zero for past medical damage paid by Zenith and by the VA Hospital (zero each for low back, neck/upper back, and pain management), zero for past noneconomic damages, and zero for future noneconomic damages.

The jury found that plaintiff was also negligent, and his own negligence was a substantial factor in causing his harm, and he was 75 percent responsible, while defendant was 25 percent responsible.

The trial court accordingly entered judgment in favor of plaintiff in the reduced amount of $720.50 (25 percent of $2,882).

Plaintiff moved for a new trial, arguing that the jury, having found defendant negligently caused plaintiff harm, was required to award the "stipulated" amount of medical damages, "undisputed" wage loss, and some amount of noneconomic damages. Defendant opposed the motion, noting defendant had not conceded that the stipulated amounts claimed by plaintiff were all attributable to the 2008 incident.

The record on appeal does not contain a reporter's transcript of the hearing on the motion for new trial; it contains only the minute order that the trial court denied the motion for new trial after considering all arguments, written *and oral*.

The court awarded section 998 costs, as we describe *post*.

DISCUSSION

I

Sufficiency of Evidence

Plaintiff contends on appeal that the evidence is insufficient to support the verdict because the jury found defendant negligently caused damage to plaintiff yet awarded only a paltry sum despite the large amount of "stipulated" expenses.

Plaintiff's contention is precluded by his failure to present an adequate record for review.

"[W]here a party to a civil lawsuit claims a jury verdict is not supported by the evidence, but asserts no error in the jury instructions, the adequacy of the evidence must be measured against the instructions given the jury." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.)

On appeal, the judgment is presumed to be correct, and all intendments and presumptions are indulged to support it on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see also, *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. (*Denham, supra*, 2 Cal.3d at p. 564; see also, Cal. Const., art. VI, § 13 [no judgment shall be set aside or new trial granted unless reviewing court concludes error has resulted in miscarriage of justice].)

The appellant bears the burden of providing an adequate record to assess error. (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483; *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.)

"[W]here the appellant fails to produce a complete record of oral trial proceedings, a challenge based on the claim of evidence insufficiency will not be heard. [Citation.]" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 987.) "[I]t is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence. [Citations.]" (*Id*. at p. 992.)

Here, plaintiff provided a *partial* reporter's transcript, but omitted critical portions, i.e., closing arguments and the reading of jury instructions. (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [no reporter's transcript of closing arguments to jury].) Plaintiff also failed to make the written jury instructions part of the record on appeal and omitted them from his appellant's appendix in lieu of clerk's transcript.

Thus, plaintiff's failure to supply an adequate record precludes his substantial evidence argument.

Additionally, the partial record available to us shows that plaintiff fails to prove his substantial evidence claim.

He argues the "mere fact" that the jury awarded him his out-of-pocket copayments to the VA Hospital shows the jury believed that the VA Hospital bills were attributable to this accident. In response to defendant's argument that plaintiff never asked the jury to determine how much of the bills were attributable to this accident, as opposed to his preexisting problems, plaintiff argues defendant waived this argument by failing to request a special verdict form from which the jury could have specifically made causation findings as to each injury. Plaintiff argues the verdict finding -- that defendant's negligence was a substantial factor in causing plaintiff's harm -- should be treated as a general verdict encompassing an implicit finding in the prevailing party's favor on every fact or issue essential to support the jury's conclusion. Otherwise, says plaintiff, the verdict is fatally inconsistent. Plaintiff argues inconsistency is also proven by the jury's failure to make an award for intervenor Zenith Insurance (apparently, the workers' compensation insurer) for payments which plaintiff argues were indisputably appropriate while plaintiff was getting worker's compensation benefits.

However, an award for all bills was not essential to the jury's finding that defendant caused some harm, and Zenith's bills are not at issue since Zenith dismissed its appeal.

Most importantly, plaintiff forgets that he bore the burden of proof at trial. Where, as here, it is the *plaintiff* (the bearer of the burden of proof) who appeals on substantial evidence grounds from a verdict favoring the *defendant* (who did not have the burden of proof), it could be said that the question on appeal is not whether the evidence supports the judgment, but whether the evidence *compels* a finding in favor of the appellant as a

matter of law. (*Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc*. (2011) 196 Cal.App.4th 456, 465.)

Plaintiff fails to show that the evidence *compels* an award for the stipulated medical bills for which the jury awarded zero. The jury was instructed that "[Plaintiff] is not entitled to damages for any physical or emotional condition that he had before [defendant's] conduct occurred. . . ." While the jury's award of plaintiff's out-of-pocket expenses would appear to suggest that at least some of the other items were attributable to the 2008 incident (such as the $28,417 VA bills for neck and upper back), the omission of closing arguments and jury instructions from the record on appeal prevents us from finding an inconsistent verdict. (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 716 [verdict is inconsistent when it is beyond the possibility of reconciliation under any possible application of evidence and instructions].) We do not know, for example, what argument, if any, was presented to the jury regarding the testimony that an award for VA bills would go to the VA, not to plaintiff. We do not know that defendant argued this testimony in opposition to the motion for new trial.

We accordingly reject plaintiff's substantial evidence challenge to the judgment.

II

Motion for New Trial

"When a trial court rules on a motion for new trial [under section 657] based upon inadequacy of the evidence, it is vested with a plenary power -- and burdened with a correlative duty -- to independently evaluate the evidence. [Citation.] For these purposes a motion asserting inadequate or excessive damages is governed by the same standards and principles as one asserting that the evidence is insufficient to sustain the verdict. (. . . § 657 [motion on either ground not to be granted 'unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision'].) In such

cases, the court 'has the power "to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact." (. . .'; it 'sits as "an independent trier of fact" . . .'; and it 'must "independently assess[] the evidence supporting the verdict" . . . .' . . . 'The trial judge has "to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict; if he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial." . . . .' . . . [court acts as 'an independent trier of fact']; . . . ['[I]t is the duty of the trial judge to review all the evidence, weigh its sufficiency and judge the credibility of the witnesses. He is at liberty to disregard the findings of the jury which are implied from the verdict. He functions as a thirteenth juror.'] . . . ." (*Ryan v. Crown Castle NG Network,s Inc*. (2016) 6 Cal.App.5th 775, 784.)

Plaintiff fails to provide an adequate record for review under the foregoing standard. We do not know why the trial court denied the motion, because the oral proceedings of the hearing on the motion are not part of the record on appeal, and the written documents presented in lieu of clerk's transcript show only a minute order that "The motion [for new trial] is denied" after the judge considered all arguments, written "and oral." Appellate courts have refused to reach the merits of an appellant's claim where no reporter's transcript of a pertinent proceeding or suitable substitute was provided. (E.g., *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *Boeken v. Philip Morris, Inc*. (2005) 127 Cal.App.4th 1640, 1672 [transcript of judge's ruling on a request for jury instruction].)

We accordingly reject plaintiff's challenge to the order denying a new trial.

III

Section 998

There were two pretrial settlement offers, each for $50,000, but the trial court awarded section 998 costs based on the first offer made in 2012, and we therefore need not address the other offer made in 2014.

Again, plaintiff fails to include in the record on appeal the transcript of the hearing on the motion, but we will consider his arguments because our review is de novo.

Generally, a prevailing party is entitled to recover its costs. (§ 1032.) Section 998 shifts the costs of trial upon a party's refusal to settle. (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 86 (*Ignacio*).) If the party who prevailed at trial obtained a judgment less favorable than a pretrial settlement offer submitted by the other party, then the prevailing party may not recover its own postoffer costs and, moreover, must pay its opponent's postoffer costs, potentially including expert witness costs. (*Ibid*.)

On appeal, we independently review whether a section 998 settlement offer was valid. (*Ignacio*, *supra*, 2 Cal.App.5th at p. 86.) We interpret any ambiguity against the proponent of the offer, and the burden is on the offering party to demonstrate that the offer is valid under section 998. (*Ibid*.) The offer must be strictly construed in favor of the party sought to be bound by it. (*Ibid*.)

In May 2012, defendant Young's Market, along with individual defendants Louis Young and Harry Young (who were not yet dismissed from the lawsuit), submitted to plaintiff a section 998 offer to compromise, offering to allow judgment to be taken in the amount of $50,000 for plaintiff. "Upon acceptance of this offer by the plaintiff [*sic*: defendant], plaintiff shall not be entitled to costs or attorneys' fees[,] and acceptance of this offer will also constitute satisfaction and settlement of all existing liens." The OFFER TO COMPROMISE directed plaintiff, if he accepted the offer, to "date and sign

the accompanying notice of acceptance . . . ." The acceptance is not part of the record on appeal.

On appeal, plaintiff argues this May 2012 offer was invalid for two reasons.

First, he claims the offer was invalid because the individual defendants Louis and Harry Young were dismissed from the lawsuit before the jury verdict. The request for dismissal (without prejudice) shows dismissal was entered on February 28, 2014. The jury returned its verdict in May 2015.

Plaintiff cites *Kahn v. The Dewey Group* (2015) 240 Cal.App.4th 227, for the proposition that a section 998 offer, to be valid, must be from the same defendants that the verdict is against. However, *Kahn* is distinguishable. There, the plaintiff who resided in a mobile home park alleged injury from the land being used as an industrial waste disposal site. He sued 20 defendants. All 20 defendants made a pretrial settlement offer that the plaintiff did not accept. Subsequently, the court granted nonsuit as to 14 of the 20 defendants. (*Id*. at pp. 229-230.) The other six defendants went to trial, but the jury was deadlocked. While a retrial was pending, the 14 dismissed defendants sought section 998 costs. The plaintiff moved to strike costs on the ground that a final judgment had not yet been entered against all 20 defendants on whose behalf the section 998 offer had been made. (*Id*. at p. 230.)

The appellate court in *Khan* held: "If multiple defendants jointly make an offer to settle pursuant to section 998, whether the offer exceeds the judgment cannot be determined by comparing it to a judgment (or judgments) entered against only *some* of the offering defendants. Instead, the offer must be compared to the judgment(s) obtained against *all* defendants. Accordingly, because in the present case no judgment has yet been entered with regard to six of the 20 defendants on whose behalf the section 998 offer was made, the trial court erred in awarding expert witness fees to the 14 dismissed defendants." (*Id*. at p. 230.)

Here, it can be determined that the offer exceeds the judgment, because there is no pending or anticipated action that might yield a judgment against the individual defendants whom plaintiff dismissed from the lawsuit. Although the dismissal was without prejudice, there is no reason to anticipate renewed litigation, because the individuals and their Market were sued as agents of each other, clearly united in interest and sued on a theory of joint and several liability.

Plaintiff's second reason for invalidity of the settlement offer is that the offer required that all liens existing in May 2012 be satisfied from the $50,000 offer. Plaintiff argues, "There is no way to know what if any potential liens may arise, so the offer is ambiguous and not capable of being valued. The lien from the VA was itself in excess of $400,000 and impossible to satisfy from the offered amount."

However, the offer was not ambiguous; it said nothing about "potential liens" but rather specified "existing liens." And plaintiff fails to show the $400,000 lien was attributable to the subject incident. In any event, plaintiff cites no authority whatsoever that the existence of liens, which are likely to exist in most tort cases, would render a settlement offer invalid under section 998. We may disregard arguments unsupported by analysis or authority. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Moreover, an offer designating the plaintiff as responsible for all medical liens is valid and comports with section 998 as nothing more than a reminder of the plaintiff's obligation to pay the medical liens. (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 374.) And liens may be a matter for negotiation between a plaintiff's counsel and the lienholders. (See *Mosey v. U.S.* (D.C. Nev. 1998) 3 F.Supp.2d 1133, 1137.)

We conclude plaintiff fails to show reversible error regarding section 998 costs.

DISPOSITION

We affirm the judgment, the order denying the motion for new trial, and the order awarding section 998 costs. Defendant shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

HULL, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.